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No. 09-1557

Supreme Court, U.S.
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In the
Supreme Court of the United States

PATCO ENERGY EXPRESS, L.L.C., PATCO ENERGY EXPRESS II, L.L.C., and PATCO ENERGY EXPRESS III, L.L.C.,

Petitioners,

v.

MICHAEL G. LAMBROS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. In order for a federal district court to have subject matter jurisdiction over a court appointed receiver, must a plaintiff obtain leave of the court appointing the receiver before filing suit?

2. Does a state supreme court decision finding state law *in personam* civil RICO forfeiture procedures unconstitutional render a state law *in rem* civil RICO forfeiture unconstitutional as well?

3. Is a court appointed receiver entitled to absolute or qualified immunity while he is acting within the scope of his authority?

PARTIES TO THE PROCEEDING

Petitioners are Patco Energy Express, L.L.C., Patco Energy Express II, L.L.C., and Patco Energy Express III, L.L.C. Petitioners are jointly owned and managed by Anjay Patel. Petitioners are engaged in the business of owning and operating gas and diesel fueling stations and the convenience stores associated with same. Petitioners allege that Respondent unlawfully seized certain inventory property contained in three fueling station convenience stores operated by the Petitioners. All of the Petitioners were plaintiffs in the District Court and Appellants in the Court of Appeals.

Respondent is Michael G. Lambros, a receiver appointed by the Superior Court of Camden County, Georgia to protect assets seized as the result of a state-law, civil RICO proceeding. Respondent was a defendant in the District Court and an Appellee in the Court of Appeals.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, Michael G. Lambros ("Lambros"), respectfully requests that this Court deny the Petition for Writ of *Certiorari* ("Petition") submitted by Petitioners, Patco Energy Express, L.L.C., Patco Energy Express II, L.L.C., and Patco Energy Express III, L.L.C. (collectively, "Patco").

ADDITIONAL STATUTES INVOLVED

O.C.G.A. § 9-8-5
Title 9. Civil Practice
Chapter 8. Receivers
§ 9-8-5. Intervention of persons asserting equitable remedies

Where property has been placed in the hands of a receiver, all persons properly seeking to assert equitable remedies against such assets shall become parties to the case by intervention and shall prosecute their remedies therein.

COUNTER-STATEMENT OF THE CASE

There is no reason, let alone a compelling reason, for the Court to grant this Petition. All of the issues presented by the Petition are well-settled areas of law. There is no split between the courts of appeal regarding any of the issues presented by the Petition which would require this Court's attention to resolve. Therefore, the Eleventh Circuit Court of Appeals' unpublished, *per curiam* decision below does not present any reason for this Court to grant this Petition.

The controversy underlying this Petition began on March 4, 2008 when the District Attorney for the Brunswick Judicial Circuit filed a lawsuit against Fairley Cisco ("Cisco") in the Superior Court of Camden County, Georgia, Case No. 08V0302-SS2, (the "State Court Action") for violation of Georgia's civil RICO statute, O.C.G.A. § 16-14-1 *et seq*. Pet. App. 35. Cisco was the owner of various fueling stations in Georgia, and the State Court Action named Cisco and his business entities[1] as defendants *in personam*. Pet. App. 35. Additionally, the State Court Action named three fueling stations located in Camden County owned by Cisco Travel Plaza II, Inc. and Cisco Express, Inc. as defendants *in rem*. Pet. App. 86-87. The interactions between Petitioners and Respondent regarding these three fueling stations form the basis for this Petition and the proceedings below.

The State Court Action alleged that Cisco, his business entities, and the three fueling stations violated Georgia's Civil RICO statute by tampering with diesel and gasoline pumps in order to make them dispense a smaller volume of fuel than that indicated to the consumer. Pet. App. 36. On April 9, 2008, the Superior Court of Camden County granted the State of Georgia's Motion for a Preliminary Injunction in the State Court Action and appointed Respondent as Receiver over Cisco's property and assets (the "Receivership Order"). Pet. App. 86-104.

The Receivership Order authorized Respondent to take and retain possession, custody, and control over

[1] Cisco Travel Plaza, Inc.; Cisco Travel Plaza II, Inc.; Cisco Oil, Inc., Cisco Express, Inc.; and Cisco Enterprises, Inc.

all assets and property in which Cisco and his business entities held a direct or indirect interest. Pet. App. 93-94. The Receivership Order also granted Respondent the discretion to manage, operate, supervise, and maintain any of Cisco's businesses. Pet. App. 94-95 As a corollary to those rights, the Receivership Order granted Respondent the authority to participate in legal proceedings to collect and take possession of all goods or chattels of those businesses. Pet. App. 95-96.

Respondent's receivership also included the three fueling stations referenced above (collectively, the "Stations"). Pet. App. 95. Petitioners allege that, prior to the filing of the State Court Action, Cisco sold the Stations to Keldeep Sekhon, also a defendant to the State Court Action. Pet. App. 36-37, 86-87. Sekhon allegedly disappeared, and Petitioners claim that another entity, Georgia Petro, L.L.C., approached them, claiming to have purchased the Stations from Sekhon. Pet. App. 36-37. Following Respondent's appointment as Receiver, Petitioners executed an operating agreement with Georgia Petro for the Stations. Pet. App. 37-39. Thereafter, Petitioners allege that they purchased inventory for the Stations and began operations. Pet. App. 38.

On October 30, 2008, Respondent's counsel wrote a letter to Petitioners counsel stating that the Respondent had recently acquired ownership of the Stations and that Petitioners had been divested of their interest in them. Pet. App. 40. The correspondence put Petitioners on notice of their status as tenants at sufferance and informed them that Respondent, as owner of the Stations, had terminated any possessory rights they might claim. Pet. App. 40. The correspondence demanded that

Petitioners return possession of the Stations to Respondent and advised Petitioners that failure to do so would result in Respondent filing a dispossessory action. Pet. App. 40. Petitioners refused Respondent's demand.

Nevertheless, on January 5, 2009, Petitioners and Respondent met to resolve the issues between them, but they were unable to resolve their issues on that date. Pet. App. 40. However, on the next day, January 6, 2009, Petitioners' counsel sent correspondence to Respondent's counsel stating that Petitioners would voluntary relinquish possession of the Stations. Pet. App. 40-41.

Thereafter, Petitioners closed the Stations and surrendered the keys to the Camden County District Attorney for delivery to Respondent. Pet. App. 41. Petitioners allege that Respondent then seized the inventory contained in the Stations. Pet. App. 41. On January 13, 2009, Respondent's counsel advised Petitioners' counsel that the inventory was being removed from the Stations and that Petitioners were no longer permitted on the properties. Pet. App. 41.

Rather than applying to the Superior Court of Camden County for an order releasing their claimed property from the Receivership, Petitioners filed suit against Respondent in the United States District Court for the Southern District of Georgia on January 27, 2009. Pet. App. 34-46. Petitioners allege that Respondent is liable under 42 U.S.C. § 1983 for seizing their alleged property in bad faith and without a hearing. Plaintiffs further allege that all of their claims against Respondent arose during the course of the Receivership for acts performed in Respondent's

official capacity as Receiver. However, Petitioners do not allege that they sought the permission of the Superior Court of Camden County before filing suit against Respondent.

Shortly after filing their Complaint, Petitioners filed a Motion for Emergency Hearing for Temporary Restraining Order and Preliminary Injunction on February 4, 2009. The District Court held a hearing regarding the injunction on February 10, 2009 and denied Petitioners' Motion on February 11, 2009. Patco Energy Express, L.L.C. v. Lambros, No. CV2009-004, 2009 WL 331483 (S.D. Ga. Feb. 11, 2009). Petitioners then filed an appeal challenging the denial of their Motion.

Pending that appeal, Respondent filed a Motion to Dismiss. On May 8, 2009, the District Court granted Respondent's Motion, dismissing the Petitioners Complaint in its entirety. Patco Energy Express, L.L.C. v. Lambros, No. CV2009-004, 2009 WL 1292492 (S.D. Ga. May 8, 2009). The District Court held that the Petitioners' failure to obtain leave of the Superior Court of Camden County before instituting their action against the Respondent deprived the District Court of subject matter jurisdiction. Id. at *2 (citing Barton v. Barbour, 104 U.S. 126, 127, 26 L. Ed. 672 (1888)). On May 13, 2009, Petitioners appealed both of the District Court's rulings. The Court of Appeal consolidated both appeals on July 13, 2009.

Two days later, on June 15, 2009 the Supreme Court of Georgia decided Cisco v. Georgia, holding that the *in personam* civil forfeiture provisions of Georgia's civil RICO statute, O.C.G.A. § 16-14-7(m), violated the procedural due process protections of the United

States and Georgia Constitutions. Cisco v. Georgia, 285 Ga. 656, 680 S.E.2d 831 (2009). However, Cisco did not address the *in rem* civil forfeiture provisions of Georgia's civil RICO statute, and the Cisco court recognized the existence of the *in rem* forfeiture proceedings against the Stations. Id. at 656 n.1, 832 n.1.

On November 24, 2009, the Eleventh Circuit Court of Appeal issued a *per curiam* decision, affirming the District Court dismissal of Petitioners' Complaint. Patco Energy Express, L.L.C. v. Lambros, Nos. 09-10790, 09-12547, 353 Fed. Appx. 379 (11th Cir. 2009) (per curiam). The Court of Appeal, applying this Court's decision in Barton v. Barbour (the "Barton Doctrine"), held that Petitioners' failure to obtain leave from the Superior Court of Camden County prior to suing Respondent deprived the District Court of subject matter jurisdiction. Id. at 381 (citing Barton, 104 U.S. at 127). The Court of Appeal also addressed the Georgia Supreme Court's decision in Cisco, finding the decision irrelevant because Respondent's alleged actions and Petitioners' Complaint predated Cisco and, therefore, did not relieve Petitioners of their duty to obtain leave from the Superior Court of Camden County prior to filing their Complaint. Id. Petitioners then filed a Petition for Panel Rehearing on December 1, 2009. The Court of Appeal denied the Petition for Panel Rehearing on May 23, 2010. This Petition followed.

There is no compelling reason, indeed no reason, for the Court to grant this Petition. Sup. Ct. R. 10. The Barton Doctrine is a well-settled and widely accepted rule governing suits against court-appointed receivers. The Court of Appeal's *per curiam* treatment of

Petitioners' appeals demonstrate the uncontroversial nature of this issue. Because the Barton Doctrine is well settled law, the issues raised by this Petition do not come under the principal purpose of certiorari jurisdiction, the resolution of conflicts among the Courts of Appeal and state courts of last resort. Braxton v. U.S., 500 U.S. 344, 347-48, 111 S. Ct. 1854, 1857 (1991). Additionally, certiorari is not appropriate because the issues raised by this petition are not novel questions of federal law. Kossick v. United Fruit Co., 365 U.S. 731, 733, 81 S. Ct. 886, 889 (1961). Accordingly, Respondent respectfully requests that the Court deny the Petition.

REASONS FOR DENYING THE PETITION

I. The Barton Doctrine Applies.

"It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained." Barton, 104 U.S. at 128. The Barton Doctrine denies courts jurisdiction over claims made against court-appointed receivers, unless the requisite leave is first obtained. Id. at 139. The Barton Doctrine is well-settled law in the State of Georgia and in the Eleventh Circuit. Bugg v. Lang, 35 Ga. App. 704, 134 S.E. 623 (1926); Carter v. Rodgers, 220 F.3d 1249, 1252-53 (11th Cir. 2000). Additionally, the Barton Doctrine has been adopted by courts in every circuit.[2]

[2] The Courts of Appeal in the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits apply the Barton Doctrine: Muratore v. Darr, 375 F.3d 140 (1st Cir. 2004); Lebovits v. Scheffel (In re Lehal Realty Assocs.), 101 F.3d 272 (2d Cir. 1996); W. N.Y. & P.R. Co. v. Penn Ref. Co., Ltd., 137 F. 343, (3d

In Carter v. Rodgers, the Eleventh Circuit adopted the Barton Doctrine to claims made against a bankruptcy trustee who was sued without obtaining leave of the bankruptcy court appointing the trustee. 220 F.3d at 1252. The Eleventh Circuit noted that the issue was a matter of first impression in the circuit; however, it found support for the adoption of the Barton Doctrine legion. Id. (quoting In re Linton, 136 F.3d 544, 545 (7th Cir. 1998)). The plaintiff in Carter attempted to side step the Barton Doctrine by arguing that it only applied when a state court remedy is sought; however, the Eleventh Circuit disagreed, holding that leave of the appointing court is required to establish subject matter jurisdiction over a suit against a court appointed receiver, regardless of whether the plaintiff files suit in state or federal court. Id. at 1253 (quoting In re Kashani, 190 B.R. at 885).

Despite the clarity of the Barton Doctrine, Petitioners did not obtain leave of the Superior Court of Camden County before filing their lawsuit. To date, Petitioners have not explained their failure to accomplish this simple task. Instead, Petitioners

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Cir. 1905); Gordon v. Nick, No. 96-1858, 162 F.3d 1155 (4th Cir. 1998) (unpublished table decision); Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236 (6th Cir. 1993); In re Linton, 136 F.3d 544 (7th Cir. 1998); Kashani v. Fulton (In re Kashani), 190 B.R. 875 (9th Cir. BAP 1995); Springer v. Infinity Group Co., No. 98-5182, 189 F.3d 478 (10th Cir. 1999) (unpublished table decision); Carter, 220 F.3d at 1252-53. The Fifth and Eighth Circuit Courts of Appeal have not yet applied the Barton Doctrine, but the district and bankruptcy courts in the those circuits have: In re Costal Plains, Inc., 326 B.R. 102 (Bankr. N.D. Tex. 2005), *aff'd on other grounds*, 338 B.R. 703 (N.D. Tex. 2006); Republic Bank of Chicago v. Lighthouse Mgmt. Group, Inc., No. 10-537, --- F. Supp. 2d ---, 2010 WL 2539344 (D. Minn. June 16, 2010).

make repeated statements about irrelevant, unsupported alleged exceptions to the Barton Doctrine.

Petitioners assert the applicability of 28 U.S.C. § 959(a) as a complete exception to the Barton Doctrine on the basis of the statute's limited business operations exception, which applies when a trustee or receiver is accused of violating "state and federal laws associated with the operation of the business" under their control. In re J.F.D. Enterprises, Inc., 223 B.R. 610, 624 (Bankr. D. Mass. 1998), aff'd DiStefano v. Stern, 236 B.R. 112 (D. Mass. 1999), aff'd In re J.F.D. Enterprises, Inc., 215 F.3d 1312 (1st Cir. 2000). Petitioners' position ignores the purpose of § 959(a).

The purpose of § 959 is twofold. First, it relieves parties having post-petition claims "from the obligation of bringing actions in the" forum appointing the bankruptcy trustee. Id. Second, it ensures that the bankrupt estate is obligated "to comply with applicable state and federal laws associated with the operation of the [bankrupt] business." Id. "There is no evidence . . . that it was intended to expand the personal liability of court appointed functionaries." Id. Instead, § 959(a) is only intended to apply ***after a bankruptcy petition is filed***. Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47 (2d Cir. 1976) (emphasis supplied).

Moreover, Petitioners' assertion misunderstands the meaning of § 959(a). In re DeLorean Motor Co., 991 F.2d at 1241. § 959(a) "does not apply to suits . . . for actions taken while administering the estate." Id. Actions taken to collect, preserve, hold, and liquidate assets "do not constitute 'carrying on business' as that term has been judicially interpreted." Id. Therefore,

Respondent's collection and liquidation of the Stations cannot fall under § 959(a) because those actions do not constitute "carrying on business." Id.

Petitioners also cite 11 U.S.C. § 543(b) as an exception to the Barton Doctrine. Again, this position is incorrect and directly contradicted by case law. § 543(b) only applies to receivers appointed by state courts: when the receiver "has knowledge of the commencement of a case under the [Bankruptcy] Code . . . ." In re Lizeric Realty Corp., 188 B.R. 499, 506 (Bankr. S.D.N.Y. 1995).

Here, neither § 959(a) or § 543(b) applies because there is no bankruptcy filing at issue. Instead, the origin of this Petition is a state court civil RICO proceeding. Therefore, the application of § 959(a) or § 543(b) to the underlying facts is strained at best.

Finally, the Receivership Order did not waive the Barton Doctrine by giving blanket permission to sue Respondent. Petitioner relies upon O.C.G.A. § 9-8-3 and choice quotations from the Receivership Order to assert that the Superior Court of Camden County waived the requirements of the Barton Doctrine when it created the Receivership. Petitioners' reliance on O.C.G.A. § 9-8-3 is misplaced, and Petitioners' position ignores other sections of the Georgia Code pertaining to receivers. In particular, Petitioners ignore O.C.G.A. § 9-8-5, which requires those claiming a remedy in property held by a receiver ***to intervene in the action creating the receivership*** in order to assert their rights. In Castleberry v. Long, the Supreme Court of Georgia held that a purported purchaser of property from a corporation in receivership was required to file an intervention in the suit in which the receivership

was authorized in order to assert its rights in the property seized by the receiver. Castleberry v. Long, 176 Ga. 293, 167 S.E. 883 (1933).

Here, the application of § 9-8-5 and Castleberry is clear. Petitioners are parties asserting a right in property placed in the hands of a receiver, the Respondent. Georgia law requires the Petitioners to file an intervention in the suit which established the receivership, not unlike the requirements of the Barton Doctrine. Therefore, the Barton Doctrine applies to Petitioners claims, barring any suit against Respondent, absent leave from the Superior Court of Camden County.

II. Cisco v. Georgia is Irrelevant.

Petitioners incorrectly claim that Respondent's appointment as receiver is void *ab initio* because of the decision in Cisco v. Georgia where the Supreme Court of Georgia held that Georgia's *in personam* civil RICO forfeiture procedures were unconstitutional. 285 Ga. at 657-58, 680 S.E.2d at 833-34. Petitioners' claims ignore the basis upon which the Court of Appeals held Cisco irrelevant.

In the underlying Court of Appeals opinion, the court held that Cisco was irrelevant to Petitioners' claims because all of the interactions between Petitioners and Respondent, the filing of the Complaint in District Court, and the dismissal by the District Court, occurred ***before*** the Georgia Supreme Court decided Cisco. Patco Energy Express, L.L.C., 353 Fed. Appx. at 381 (emphasis supplied). Therefore, when the facts underlying the Complaint and this Petition occurred, Respondent was a duly appointed

receiver. Id. Thus, the Court of Appeals correctly found that Petitioners were still required to adhere to the requirements of the Barton doctrine because "[n]othing in the Cisco case relieves [Petitioners] of the duty to seek the leave from the appointing court before filing suit against Lambros in a second court." Id.

Additionally, Petitioners completely misunderstand Cisco. The Cisco court held that O.C.G.A. § 16-14-7(m), the section of Georgia's civil RICO statute providing for pre-hearing *in personam* forfeiture, was unconstitutional because it lacked the necessary safeguards of criminal procedure. 285 Ga. at 657-58, 680 S.E.2d at 833-34. However, Cisco did not invalidate Georgia's *in rem* civil RICO forfeiture section, which the court found had ample historical support. Id. at 659-60, 834-35 (citing U.S. v. Bajakajian, 524 U.S. 321, 330, n.5, 118 S. Ct. 2028 (1998); Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-82, 94 S. Ct. 2080 (1974)).[3] In fact, the court specifically recognized that the State Court Action "also included *in rem* forfeiture proceedings against the three truck stops [the Stations]." Id. at 656 n.1, 832 n.1.

Therefore, Cisco is not applicable because (1) Cisco did not excuse Petitioners' failure to comply with the Barton doctrine and (2) the State Court Action and the

[3] "The United States Supreme Court has recognized that civil asset forfeiture, with its biblical roots and common law development in medieval England, has for centuries been an in rem proceeding against property, operating under the legal fiction that the seized property, and not the property's owner, is the guilty party."

Receivership Order allowed for the *in rem* forfeiture of the Stations.

III. Respondent Has Absolute and Qualified Immunity.

Respondent, as a receiver, is entitled to both absolute and qualified immunity. Valdez v. City and County of Denver, 878 F.2d 1285, 1288 (10th Cir. 1989) (noting that the circuits "agree with virtual unanimity that court officers sworn to execute court orders are shielded by absolute immunity in the performance of their duty"); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982) (qualified immunity). Respondent's entitlement to immunity is a matter of federal law and cannot be diminished or modified by state law. Martinez v. Cal., 444 U.S. 277, 284 & n.8, 100 S. Ct. 553, 558 & n.8 (1980). Therefore, Petitioners' position regarding the Receivership Order is irrelevant because state law cannot define the defenses to a § 1983 action. Id.

Absolute judicial immunity applies to all of a receiver's actions taken while acting within the scope of his authority, even if a party alleges that the receiver's actions were "in error, malicious, or in excess of [his] jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S. Ct. 1099 (1978). An allegation that a receiver acted in bad faith will not overcome his defense of absolute judicial immunity. Mireles v. Waco, 502 U.S. 9, 11, 112 S. Ct. 286, 288 (1991). The only exception to absolute judicial immunity applies when a receiver's actions are *prima facie* beyond the scope of the receiver's official duties, such as when the receiver acts in a private, non-official capacity. Property Mgmt. & Invs., Inc. v. Lewis, 752 F.2d 599,

603 (11th Cir. 1985); Henzel v. Gerstein, 608 F.2d 654, 657-58 (5th Cir. 1979).

Here, the dismissal of Petitioners' complaint was proper because Petitioners did not make sufficient allegations to support a claim against Respondent. Petitioners were required to plead that Respondents actions exceeded the scope of this authority in order to state a claim under § 1983. Petitioners have not made the requisite allegations, and the allegations they have made, including the allegation that there was no basis for the seizure fo the Stations, are simply insufficient to overcome Respondent's absolute judicial immunity. Stump, 435 U.S. at 356-57, 98 S. Ct. at 1105.

Additionally, Respondent is entitled to qualified immunity. Qualified immunity protects those who perform discretionary functions while acting as government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818, 102 S. Ct. at 2738. The doctrine of qualified immunity employs a standard of objective reasonableness to determine if the official's actions are entitled to immunity. Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 925 (11th Cir. 2000). Objective reasonableness under this standard is measured "by reference to clearly established law" ***at the time the questioned action occurred***. Harlow, 457 U.S. at 818, 102 S. Ct. at 2738 (emphasis added). "[A] clearly established law" is one that gives the defendant fair warning that the conduct is unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516 (2002). Therefore, Petitioners' interpretation of Cisco would not defeat Respondent's

qualified immunity, even if Petitioners' interpretation was correct, because the "clearly established law" in Georgia at the time Respondent seized the Stations permitted his actions, regardless of whether the forfeiture was *in rem* or *in personam*.

Respondents' seizure of the Stations occurred in furtherance of his official duties as a Receiver appointed by the Superior Court of Camden County to protect receivership assets. Respondent's seizure of the stations was within his discretion to protect those assets he was charged to preserve. Therefore, Respondent is entitled to immunity.

CONCLUSION

For all the reasons set forth above, and because Petitioners can show no compelling reason for reviewing the Eleventh Circuit's reasonable *per curiam* decision, Patco's Petition for writ of *certiorari* should be denied.

Respectfully submitted,

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